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No. 90-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NEW ORLEANS PUBLIC SERVICE INC.,

Petitioner,

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, JOSEPH I. GIARRUSSO, LAMBERT C. BOISSIERE, JR., MICHAEL EARLY, JAMES SINGLETON, DOROTHY MAE TAYLOR, JOHNNY JACKSON, and PEGGY WILSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

HERSCHEL L. ABBOTT, JR.
DAVID G. RADLAUER
EDWARD H. BERGIN
201 St. Charles Avenue
New Orleans, LA 70170
(504) 582-8000

REX E. LEE*
DAVID W. CARPENTER
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

THOMAS O. LIND
317 Baronne Street
New Orleans, LA 70112
(504) 595-2218

Of Counsel:
JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE
SIDLEY & AUSTIN

*Counsel of Record

QUESTION PRESENTED

This case presents a recurring question under the Federal Power Act that has been decided in sharp conflict with this Court's prior decisions and with the decisions of the Massachusetts, North Dakota and Minnesota Supreme Courts:

> Whether states or municipalities have jurisdiction, subject only to state substantial evidence requirements, to nullify FERC's wholesale rate decisions by deciding it was "imprudent" for a utility to fail to "minimize its losses" during construction of a wholesale generating facility and by barring recovery of, and thereby "trapping," wholesale costs that FERC found to be "just and reasonable" and ordered the utility to incur?

RULE 29.1 STATEMENT

Petitioner New Orleans Public Service Inc. ("NOPSI") is a wholly-owned subsidiary of Entergy Corporation ("Entergy"). Entergy has no parent company, and neither Entergy nor NOPSI has any subsidiaries that are not wholly-owned by Entergy either directly or through other wholly-owned subsidiaries.

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THE COUNCIL OF THE CITY OF NEW ORLEANS, *et al.*,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

New Orleans Public Service Inc. ("NOPSI") respectfully submits this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix ("App.") 1A-24A) is reported at 911 F.2d 993. The opinion of the District Court (App. 25A-32A) is unreported.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on August 29, 1990. App. 2A. On October 17, 1990, the Court of Appeals denied petitioner's timely petition for rehearing by the panel. App. 34A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). *See Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the Federal Constitution and the Federal Power Act, 16 U.S.C. §§ 791a-828c, are reprinted at App. 35A-46A.

STATEMENT OF THE CASE

This case presents the same question that was decided in *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986), and in *Mississippi Power & Light Co.* v. *Mississippi ex rel Moore* ("*MP&L*"), 487 U.S. 354 (1988): whether a state or municipality may use its retail ratemaking authority to nullify a FERC decision that allocates the wholesale costs of generating electricity among affiliated utilities that serve different states. Indeed, this case involves a retail ratemaking order that does precisely what was held *per se* unlawful in *MP&L*: it has "prevented NOPSI from recovering" (App. 2A)—and "trapped"—over $135 million of the very FERC-mandated costs that were at issue in *MP&L*. 487 U.S. at 372.

However, the Fifth Circuit has held that the Council's Order is not "facially preempted" under *MP&L*. It concluded that this Court's "prior preemption decisions" establish only that FERC has exclusive jurisdiction over a multi-state system's *initial* decision to build a generating plant, and the Fifth Circuit held that the states retain jurisdiction to determine whether one of the affiliated utilities behaved "imprudently" while construction of the wholesale plant was "underway." App. 15A-18A. Under this holding, states may bar the recovery of wholesale costs that FERC found to be "just and reasonable" and ordered the utility to incur whenever a state finds that the utility was imprudent in failing to take greater steps to "minimize its losses" during construction of a power plant. App. 16A-18A.

This holding squarely conflicts with *MP&L* and *Nantahala*. Further, even if the Fifth Circuit were correct that this case is not controlled by this Court's "prior preemption decisions," the Fifth

Circuit's holding conflicts with decisions of the supreme courts of Massachusetts, Minnesota, and North Dakota[1] and with numerous FERC and court of appeals decisions that recognize the jurisdiction that the Fifth Circuit has denied FERC.[2] Each decision recognizes that it would destroy the Congressional scheme if FERC lacked jurisdiction to make these prudence determinations and if states or municipalities could bar recovery of the FERC-allocated costs on such grounds.

For this reason, FERC has argued, in four separate *amicus curiae* briefs in this case, that the Council's Order subverts FERC's regulation of interstate commerce and is preempted. *See* pp. 21-22, *infra*.

1. The MSU System And Grand Gulf. This case arises from the same facts and same FERC orders that were at issue in *MP&L*. Because this Court also discussed the Council's Order in its earlier abstention holding in this case (*NOPSI* v. *Council of New Orleans*, 109 S. Ct. 2506 (1989)), the facts that give rise to this case can be set forth briefly.

Petitioner NOPSI provides electric service in the City of New Orleans. Like MP&L, NOPSI is a wholly-owned subsidiary of Entergy Corporation (formerly named Middle South Utilities, Inc. ("MSU")) and is a part of the MSU System. The MSU System also includes two other operating electric utility subsidiaries (Arkansas Power & Light Company and Louisiana Power & Light Company), and System Energy Resources, Inc. (formerly Middle South Energy, Inc.) ("MSE"), which is a separate wholesale generating subsidiary that owns the MSU System's 90% interest in Grand Gulf 1.

As this Court stated, the four MSU operating companies "operate as an integrated power pool" (*MP&L*, 487 U.S. at 357), in

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[1] *Eastern Edison Co.* v. *Department of Public Utilities*, 446 N.E. 2d 684 (Mass. 1983); *Northern States Power Co.* v. *Minnesota Public Utilities Comm'n*, 344 N.W.2d 374 (Minn. 1984); *Northern States Power Co.* v. *Hagen*, 314 N.W.2d 32 (N.D. 1981).

[2] *See* pp. 17-20, *infra*.

which each MSU company "transmit[s] the electricity [it] produce[s] to a central dispatch center and . . . draws back the power it needs to meet customer demand." App. 3A-4A.

The arrangements among the MSU companies for the transmission, sale, and exchange of energy are governed by System Agreements that are filed with FERC. *MP&L*, 487 U.S. at 357. Under these binding FERC rate schedules, decisions of whether and how to add generating capacity to the MSU System—or sell off capacity—are made by a majority vote of a system-wide operating committee. Because NOPSI and the other MSU operating companies each have one representative on the committee, each company thus participates in decisions to add capacity. *See MSE*, 31 FERC ¶ 61,305, pp. 61,645-51 (1985).

In 1974, as part of a system plan to reduce its dependence on oil and gas, MSU formed MSE to finance, construct, and operate the Grand Gulf 1 nuclear plant. The available information in 1974 showed that Grand Gulf 1 would be needed to meet the growing demand in the system and would further produce enormous savings for the system as a whole.

However, it later became apparent that system-wide demand would be lower than forecast and that "regulatory delays," "additional construction requirements" resulting from the Three Mile Island accident, and high inflation would dramatically increase the cost of constructing the plant. *MP&L*, 487 U.S. at 359. Nonetheless, although the System cancelled other projects—and had previously sold off a 10% interest in Grand Gulf (*see MSE*, 31 FERC ¶ 61,305, p. 61,668 n.3 (1985))—the MSU System decided to retain its 90% interest in Grand Gulf 1 and to continue construction of it. As a FERC ALJ found, it appeared in 1980 that Grand Gulf 1 would produce "power for a total cost (capacity and energy) which would be less than existing alternatives on the system." *MSE*, 26 FERC ¶ 63,044, pp. 65,112-13 (1984); *see MP&L*, 487 U.S. at 359.

However, the costs of completion escalated between 1980 and July, 1985, when Grand Gulf 1 began commercial operations.

FERC found that these cost escalations were "unforeseeable" (*MSE*, 31 FERC ¶ 61,305, p. 61,654-55 (1985)), and FERC "approved" the finding of one of its ALJ's that the "decision to construct and complete Grand Gulf 1 was sound." App. 6A; *see MP&L*, 487 U.S. at 363.

2. The FERC Proceedings And Decisions. Grand Gulf 1 required the MSU System to adopt a new method of allocating generating costs among the MSU companies, and the MSU companies filed two new rate schedules with FERC in 1982: (1) a Unit Power Sales Agreement ("UPSA"), which establishes wholesale rates for Grand Gulf power and allocated the Grand Gulf energy and capacity among the MSU companies, and (2) a new System Agreement, which allocates other generating and transmission costs. UPSA and the 1982 System Agreement, taken together, allocate all the power available on the Middle South System.

Because the "parties . . . recognized the impact that FERC's Order would have on the jurisdiction of the state regulatory agencies" (*MP&L*, 487 U.S. at 375), the City of New Orleans and representatives of the other affected jurisdictions (Mississippi, Arkansas, and Louisiana) all participated extensively in these FERC proceedings. *See MP&L*, 487 U.S. at 361. Each argued that little or no Grand Gulf output should be allocated to its operating utility.

After three years of proceedings, FERC issued a decision establishing "just and reasonable" wholesale rates for Grand Gulf 1 power. Because FERC "implicitly" found that Grand Gulf 1 had been "prudent[ly]" planned, constructed, and completed to meet the needs of the MSU System as a whole (*MP&L*, 487 U.S. at 363), FERC allowed MSE to "recoup 100% of the costs of Grand Gulf in the wholesale rates it charged to the four operating companies." *MP&L*, 487 U.S. at 375.

FERC further found that the reasonable costs of Grand Gulf should be allocated among the MSU companies on whose behalf

the plant was built and that the establishment of "just, reasonable, and non-discriminatory" rates required that the MSU operating companies "share the cost of the system's investment in nuclear energy in proportion to their relative demand for energy generated by the system as a whole." *MP&L*, 487 U.S. at 364. To achieve this allocation, FERC dramatically changed the entitlement percentages of UPSA, as follows:

	UPSA, as filed	Allocation under Opinion No. 234
AP&L	0%	36%
LP&L	38.57%	14%
MP&L	31.63%	33%
NOPSI	29.80%	17%

In adopting this cost allocation method, FERC rejected arguments of Mississippi and Arkansas representatives.[3] In addition, FERC explicitly rejected New Orleans' arguments that NOPSI should be allocated only 9% of the costs of Grand Gulf 1 and proportionately greater amounts of the MSU System's lower-cost coal power.[4]

[3]Specifically, FERC rejected their claims that Grand Gulf 1 allocations should be based on (1) "local conditions" and the "needs" of individual companies (*see MP&L*, 487 U.S. at 364 & 376), (2) representations of operating company officials to state or local officials (*see MP&L*, 487 U.S. at 376 n.14), or (3) the private contractual allocations. *See MSE*, 31 FERC at 61,655; *MSE*, 32 FERC at 61,961; *see also MP&L*, 487 U.S. at 363-64. For example, FERC rejected Arkansas's and AP&L's arguments that a 0% allocation was appropriate because AP&L had itself acquired sufficient coal and nuclear capacity to meet its own needs and had contracted away its share of Grand Gulf 1 to the other MSU companies. 32 FERC at 61,958; 26 FERC at 65,119.

[4]New Orleans urged that FERC should achieve these results by revising the 1982 System Agreement to require "production cost equalization" and give all four MSU operating companies the benefits of the system's mix of high-cost and low-cost power. *MSE*, 31 FERC at 61,641-42; *MSE*, 30 FERC at 65,141. Alternatively, New Orleans claimed NOPSI's share of the higher-cost Grand Gulf capacity allocation should not, in any event, be more than 9% because that is its percentage of the System's peak demand. *See MSE*, 31 FERC at 61,642.

New Orleans reiterated its challenges to the FERC allocation in the initial appeals of the FERC orders (*see Mississippi Industries* v. *FERC*, 808 F.2d 1525 & 822 F.2d 1103 (D.C. Cir. 1987)), in subsequent remand proceedings before FERC (*see SERI*, 41 FERC ¶ 61,238 (1987)), and in appeals from the subsequent FERC Opinions that reaffirmed the allocations. *See City of New Orleans* v. *FERC*, 875 F.2d 903 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1805 (1990). Each tribunal rejected these claims.

3. The Council's Prudence Investigation And Order. After Grand Gulf began operations in July of 1985, the Council initiated a prudence investigation "for the purpose of determining what portion, if any, of NOPSI's Grand Gulf 1 expenses should be assumed by shareholders, rather than being passed through to its retail ratepayers." Resolution No. R-85-636. On February 4, 1988, the Council entered an order that disallows $135 million of NOPSI's FERC-mandated Grand Gulf costs and that would produce a total loss to NOPSI of approximately $300 million (including carrying costs).

As this Court has recognized (*NOPSI*, 109 S. Ct. at 2517), the basis for this disallowance is the Council's finding that, if NOPSI had been prudent, it would, in 1980, have sold "that portion of [its Grand Gulf] commitment which exceeded a 9 percent share of Grand Gulf" and replaced it by buying equivalent amounts of coal-fired capacity at hypothetically lower rates. *See* Council Order, p. 12. This would have achieved the precise result that the City had unsuccessfully urged in the FERC proceedings. *See* p. 6 & n. 4, *supra*.

The Council's disallowance order rests on four subsidiary findings. Each finding is inconsistent with FERC's explicit determinations.[5]

[5]First, the Council found that it should have been apparent in 1980 that Grand Gulf 1 power would be so much more expensive than coal-fired power that NOPSI should have sold off its then-contingent interest

(footnote continued on next page)

4. This Case. On February 9, 1988, NOPSI filed this action in federal district court to enjoin the Council's order. The District Court abstained—in a decision affirmed by the Fifth Circuit—on the ground that NOPSI's federal, as well as state law, claims could be pursued only in a parallel state court proceeding.

This Court subsequently reversed the Fifth Circuit's abstention holding. It identified two federal claims that could be maintained in federal court on remand: (1) that the Council's retail rate order

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(footnote continued from previous page)
in the plant. Council Order, pp. 11-12 & 131-32. By contrast, FERC approved NOPSI's and the MSU System's 1980 decision to complete Grand Gulf 1 (and retain their 90% interest) because it then appeared Grand Gulf would be cheaper than available alternatives and was a reasonable fuel diversification measure. *MP&L*, 487 U.S. at 363; *see* pp. 4-5, *supra*.

Second, the Council found that NOPSI's "system responsibility" for Grand Gulf is the 9% that the Council unsuccessfully urged before FERC. Council Order, pp. 11-12. By contrast, FERC found that establishment of nondiscriminatory rates and cost allocations required that NOPSI bear 17% of the costs of Grand Gulf. *See* p. 6, *supra*; App. 5A-6A n.3.

Third, the Council found NOPSI could have embarked on a fuel diversification strategy of its own "in light of local interests" if it believed the MSU System plan was not in the best interests of New Orleans. Council Order, pp. 10-11 & 119-26. By contrast, FERC found that the MSU System made the decision to complete Grand Gulf to benefit "the System as a whole." Indeed, the FERC rate schedules require system-wide decisionmaking and prohibit individual MSU companies from nullifying the system plan by unilaterally acquiring or selling off capacity. *See* pp. 3-4, *supra*.

Fourth, the Council found that NOPSI would have reduced its generation costs if it had sold off 8% of the Grand Gulf allocation in 1980 and bought equivalent amounts of coal-fired capacity at hypothetically lower rates. Council Order, p. 12. By contrast, FERC found in 1985 that the same conduct by AP&L in the late 1970's could *not* reduce either its Grand Gulf allocation or its generating costs. *See* p. 6 n.3, *supra*. Similarly, FERC's allocation method would have precluded NOPSI from realizing more than negligible savings, if any, if NOPSI could have pursued the "sell-off option" in 1980.

Further, as the District Court previously emphasized, the Council has also not identified a single "sucker" utility that would or could have prudently bought NOPSI's Grand Gulf capacity in 1980 under the Council's findings. *See NOPSI*, 109 S. Ct. at 2512 n.2.

is "facially preempted" by FERC's orders under the Federal Power Act (*NOPSI*, 109 S. Ct. at 2514-15), and (2) that the Council's disallowance was a "pretext" and a "cover" for a challenge to the original Grand Gulf allocation. *NOPSI*, 109 S. Ct. at 2515.

On remand, NOPSI filed a motion for summary judgment that raised each of these claims. However, following a trial court decision for the Council in the parallel state case, the District Court entered an order that rejected NOPSI's facial preemption claim on the merits (*see* App. 26A-27A) and that stayed litigation of the "pretextual" preemption claim. *See* App. 27A-32A.

5. The Fifth Circuit's Decision. The Fifth Circuit affirmed each of these holdings. First, while it recognized that "[t]he Council's order prevented NOPSI from recovering, in retail rates, wholesale costs FERC ordered it to incur as a result of its participation in [Grand Gulf 1]" (App. 2A), the Fifth Circuit held that the Council's Order is not "facially preempted" by the Orders that FERC had validly entered under the Federal Power Act. App. 15A-18A.

The Fifth Circuit recognized that *MP&L* holds that, if FERC had jurisdiction to make a determination, then "the states cannot have jurisdiction over it." App. 16A.[6] However, the Fifth Circuit concluded that this Court's "prior preemption decisions" "established" only that "FERC has jurisdiction to determine whether the [NOPSI and the other MSU] utilities acted prudently in deciding to participate in the Grand Gulf venture" initially and that *MP&L*, *Nantahala*, and other such decisions had not addressed FERC's jurisdiction to determine prudence "once the Grand Gulf project was underway." App. 16A.

In deciding this question, the Fifth Circuit stated that it is "plain" that FERC has not "assert[ed] jurisdiction" to determine

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[6]The Fifth Circuit further recognized that, under *MP&L*, the fact that FERC had ordered the specific purchases foreclosed the Council's claim that it was imprudent for NOPSI to resell large quantities of Grand Gulf 1 power to its retail customers. App. 15A.

a utility's prudence during construction of a wholesale generating plant and that the Fifth Circuit had to "assume" that FERC lacks this jurisdiction. App. 16A-17A. Otherwise, FERC could preempt the states from exercising what the Fifth Circuit regarded as their "traditional" regulatory authority and could achieve "the result Justice Brennan feared" in his dissenting opinion in *MP&L*. App. 17A. Because the Fifth Circuit concluded that Congress had not expressed a "clear and manifest" purpose to confer this jurisdiction upon FERC, the Fifth Circuit held that it is the states, and not FERC, that have the jurisdiction to determine the "prudence" of a utility's "failure" to "minimize its losses" by "diversify[ing] its supply portfolio" during construction of a system plant. App. 15A & 16A. The Fifth Circuit believed that this view was supported by this Court's earlier *abstention* holding in this case. App. 17A.[7]

Second, the Fifth Circuit also upheld the District Court's decision to stay the "pretextual" preemption claim on the ground that it does not present a "substantial federal question." The Fifth Circuit held that a court may not consider the Council's motives in addressing the pretext claim that this Court identified, but may do no more than determine the sufficiency of the evidence to support the Council's findings under state law. App. 20A-22A.

Finally, unless it is reversed, the Fifth Circuit decision will be a final rejection of NOPSI's federal preemption claims. Although a parallel state case is now pending in the intermediate appellate court of Louisiana, the Fifth Circuit decision will preclude litigation of the "facial" federal preemption claims in the parallel state court proceedings and will further preclude any claim based on

[7]In this regard, although the Fifth Circuit stated that "[i]t is plain" that the Court's earlier decision in this case only addressed abstention and "did not hold the facial preemption claim was foreclosed" (App. 10A), the Fifth Circuit stated that "we are convinced that the [Supreme] Court in *NOPSI III* did not believe the Council could not regulate NOPSI's activities in this regard." App. 17A.

the Council's motive.[8] Accordingly, the pending state court appeals from the Council's order have been limited to the question whether the Council's order violates state law.

REASONS FOR GRANTING THE PETITION

In this case, the Fifth Circuit has established an exception to FERC's jurisdiction under the Federal Power Act that would swallow the rule. Although the Fifth Circuit recognized FERC's exclusive jurisdiction over some elements of wholesale rates, it held that FERC does not have jurisdiction to determine whether a utility was imprudent in failing to take greater steps to "minimize" its risks during construction of a wholesale power plant. App. 15A-18A. Under this holding, each state served by a multistate utility system may do what this Court held to be preempted in *MP&L* and *Nantahala*—effectively relitigate FERC-approved rates and allocations and "trap" FERC-mandated costs —subject only to state court sufficiency of evidence review. *MP&L*, 487 U.S. at 272. This would totally subvert Congress's purpose of centralizing all such determinations in a single neutral federal forum: FERC.

The Fifth Circuit's decision squarely conflicts with *MP&L*, *Nantahala*, and their precursors—such that the Fifth Circuit's decision could be summarily reversed without burdening this Court's docket. *Compare Palmer* v. *BRG of Georgia, Inc.*, 111 S. Ct. 401 (1990). Further, even if the Fifth Circuit were correct that this Court's "prior preemption decisions" do not foreclose the Council's Order (App. 17A), the Fifth Circuit's decision conflicts with the decisions of the Massachusetts, Minnesota, and North

[8]*See Stoll* v. *Gottleib*, 305 U.S. 165, 170 (1938) (state court must give *res judicata* and collateral estoppel effect to federal court's determinations); *Embry* v. *Palmer*, 107 U.S. 3 (1882) (same); Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741, 744 (1976) (same); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 4468 (1981) (same).

Dakota Supreme Courts and with the decisions of FERC and the First, Eighth, and District of Columbia Circuits that have upheld the jurisdiction that the Fifth Circuit has denied FERC.

In this regard, this case involves far more than the departures from settled preemption principles that led this Court to review the lower courts' decisions in *Nantahala* and *MP&L*. By denying FERC jurisdiction to determine utility prudence during construction of a wholesale generating facility, the Fifth Circuit has both foreclosed FERC from making determinations essential to ratemaking and has authorized state nullification of FERC's interstate cost allocations.

I. The Fifth Circuit's Decision Conflicts With *MP&L*, *Nantahala*, And Other Decisions Of This Court.

Congress enacted the Federal Power Act because it recognized that bulk power arrangements among utilities in multistate systems are "particularly likely to affect more than one State" and that "uncontrolled [state] regulation" can "patently interfere with broader national interests." *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).[9] Congress thus established a single neutral forum to assure that wholesale rates and contracts affecting such rates are "just, reasonable, and nondiscriminatory"—with FERC to balance interests of shareholders and ratepayers in setting wholesale rates and to allocate the prudent wholesale costs among utilities serving different states. The Act protects local interests by giving states and

[9]Although it is often said that the Federal Power Act filled the "gap" created by this Court's holdings that states could not regulate such transactions (*see Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, 89-90 (1927)), Congress could have filled the "gap" by authorizing state regulation. *Prudential Ins., Co.* v. *Benjamin*, 328 U.S. 408, 427-33 (1946). Instead, Congress codified *Attleboro*'s concerns about parochial state regulation that burdens interstate commerce by requiring exclusive federal regulation of all wholesale power transactions.

municipalities the right to participate in FERC proceedings and to urge FERC to disallow wholesale costs on the ground the utilities were imprudent in incurring some or all of them. Federal Power Act, §§ 205, 206 & 306; App. 37A-44A.

Contrary to the Fifth Circuit's holding (*compare* App. 17A-18A), this Court has construed the Act to give FERC "plenary jurisdiction" to make all determinations required to regulate wholesale rates and to allocate costs among affiliated utilities, regardless of the "impact" on state regulation. *See FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 215-16 (1964). Similarly, this Court developed the "filed rate doctrine" and other preemption principles to "enforce the exclusive jurisdiction vested by Congress in FERC." *Nantahala*, 476 U.S. at 966. Decades of decisions by this Court establish that, regardless of how state action is labeled, it is preempted if its "effect" is to interfere with FERC interstate "allocation of costs" (*Maryland* v. *Louisiana*, 451 U.S. 725, 749-50 (1981)) or to impose sanctions on conduct that FERC has jurisdiction to "declare unjust and unreasonable."[10] *See Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 324-27 (1981).

Thus, the only way the Fifth Circuit could uphold the Council's Order is by holding that FERC lacks jurisdiction over the Council's claims that NOPSI was imprudent. Accordingly, the Fifth Circuit rested its decision on the ground that *MP&L*,

[10]On this basis, states have been held to be preempted from applying their tax laws, contract remedies, tort laws, and anti-fraud provisions as well as their utility laws in ways that have the effect of intruding, directly or indirectly, on federal authority. *Northern Natural Gas Co.* v. *State Corp. Comm'n of Kansas*, 372 U.S. 84, 91-92 (1963) (state utility laws); *Maryland* v. *Louisiana*, 451 U.S. 725 (1981) (state tax laws); *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981) (state contract remedies); *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) (state tort laws); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951) (state anti-fraud provisions); *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293 (1988) (state utility laws).

Nantahala, and this Court's other prior decisions do not establish FERC's exclusive jurisdiction to determine whether MSU, MSE, or the individual MSU operating companies acted prudently in failing to take greater steps to "minimize their losses" while construction of the Grand Gulf 1 plant was "underway." App. 16A-18A. However, that is precisely what *MP&L* established.

In *MP&L*, the Court reviewed a judgment of the Mississippi Supreme Court that did not question the prudence of the initial 1974 decision to build Grand Gulf 1. *Compare* 16A. Rather, the Mississippi court stated that it had become "obvious" by "the early 1980's, that both the cost and demand projections related to Grand Gulf were terribly incorrect," and the Mississippi Supreme Court ordered a prudence "review" to determine whether "MP&L, MSEI, and MSU acted reasonably when they constructed Grand Gulf 1, in light of the change in demand for electric power . . . and the sudden escalation of costs." *Mississippi ex rel. Pittman* v. *Mississippi Public Service Commission*, 506 So.2d 978, 986, 987 (1987); *see MP&L*, 487 U.S. at 368.

Had this prudence investigation proceeded, it would have addressed whether MP&L or the other MSU companies had been imprudent in the early 1980's by failing to recognize the magnitude of the risks created by Three Mile Island and to minimize their losses by cancelling or selling Grand Gulf 1, by relying on alternative power sources, or by otherwise reducing their economic commitments. The Mississippi commission would then have decided the extent to which the Grand Gulf costs should be "trapped" and borne by the utility's shareholders, rather than "passed on to MP&L's retail customers." *MP&L*, 487 U.S. at 372 n.12.

MP&L reaffirmed the Court's earlier decision in *Nantahala* and held that the Federal Power Act and the Supremacy Clause "preclude [such a] review of MP&L's managerial prudence." 487 U.S. at 369. It held that a state retail ratemaking body "may not enter an order 'trapping' the costs MP&L [and other MSU operating companies are] mandated to pay under the FERC order allocating Grand Gulf power or undertake a 'prudence' review for the purpose of deciding whether to enter such an order." *MP&L*, 487 U.S. at 372 & n.12; *see also Nantahala*, 476 U.S. at 970. This is precisely what the Council did here. *See* p. 7, *supra*.[11]

In so holding, the Court made it explicit that, contrary to the Fifth Circuit's holding, FERC has exclusive jurisdiction to determine the prudence of MP&L and the other MSU operating companies in failing to minimize their risks in the aftermath of the Three Mile Island accident. The Court stated that all such "prudence" claims were matters "FERC easily could have considered in determining whether to permit MSE to recoup 100% of the costs of Grand Gulf in the wholesale rates it charged to the four operating companies and in allocating Grand Gulf power" among those companies. *MP&L*, 487 U.S. at 375.[12] In this regard, the Court recognized that to the extent FERC did not address the prudence of the MSU companies, it was because New Orleans and the state parties "failed to raise the matter," not because FERC has not "asserted" this jurisdiction.[13]

Indeed, this is a far clearer case for preemption than was *MP&L*, for the Council's Order does more than bar recovery of FERC-mandated wholesale costs on grounds that "could have

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[11]Because the Council was then conducting the same kind of prudence investigation that the Mississippi Supreme Court had ordered, the Council filed *amicus curiae* briefs in *MP&L* that argued that at least some state investigations of the prudence of the Grand Gulf 1 expenses of MSU operating companies are not preempted by the Federal Power Act and that the Court should allow the Mississippi prudence investigation to proceed. Brief Of Council Of City Of New Orleans As Amicus Curiae, *Mississippi Power & Light Co.* v. *Mississippi*, No. 86-1970, p.10 (filed January 22, 1988). The Court rejected this claim. *MP&L*, 487 U.S. at 372 & n.12.

[12]Indeed, the Court cited FERC opinions in which it decided state claims that a utility had been imprudent in failing to take certain steps to minimize its risks during construction of a nuclear plant. *Id., citing New England Power Co.*, 31 FERC ¶ 61,047, pp. 61,081-61,084 (1985), *aff'd*, 800 F.2d 280 (1st Cir. 1986).

[13]*Compare* 487 U.S. at 375 & 379-80 n.* (Scalia, J.) (quoting colloquy with counsel for New Orleans), *with* App. 15A-16A.

been raised" before FERC.[14] The Council's prudence disallowance rests on findings that are foreclosed by FERC's explicit determinations (*see* pp. 7-8 n.5, *supra*), so the Council has collaterally attacked FERC's findings. Indeed, what the Council found to have been imprudent was NOPSI's failure to anticipate in 1980, and to seek to avoid, the very cost allocation that FERC subsequently determined to be "just and reasonable" in its 1985 orders.

Finally, the Fifth Circuit also relied on this Court's earlier abstention decision in this case and on the Fifth Circuit's conviction that "the [Supreme] Court in *NOPSI III* did not believe that the Council could not regulate NOPSI's activities" in the way it did. App. 17A. This statement is inexplicable. As the Fifth Circuit also stated, "[i]t is plain, however, that the [Supreme] Court held *only* that the [Council's] order was not 'flagrantly' unlawful for *Younger* abstention purposes; it did not hold the facial preemption claim was foreclosed." App. 10A (emphasis added). Indeed, if this Court's earlier abstention decision in this case had barred NOPSI's facial preemption claim, it would have overruled, *sub silentio*, *MP&L*, *Nantahala*, and decades of prior preemption decisions. *See* pp. 12-13 & n.10, *supra*.

But the fact that the Fifth Circuit has so misread this Court's abstention decision—and further held that the state law substantial evidence requirements are the only limitations on state subversion of FERC regulation[15]—makes review of this decision a matter of compelling importance.

[14]Similarly, the Fifth Circuit is simply wrong that its holding is "analogous" to the principle that increases in FERC-regulated wholesale rates need not invariably lead to dollar-for-dollar increases in retail rates. App. 17A-18A. The reason for this rule is that a utility can experience offsetting "cost savings in other areas" that FERC does not regulate. *See Nantahala*, 476 U.S. at 968. By contrast, here the Council did what *MP&L* and *Nantahala* prohibit: it barred recovery of the costs that FERC not only regulates, but found just and reasonable.

[15]In this regard, even if the Council's Order were not "facially preempted" under *MP&L*, the Fifth Circuit is wrong that the Order is not

(footnote continued on next page)

II. The Fifth Circuit's Decision Conflicts With Decisions Of The Massachusetts, Minnesota, And North Dakota Supreme Courts And With The Decisions Of FERC And Several Federal Courts Of Appeals.

Second, even if the Fifth Circuit were correct that this case is not controlled by the Court's "prior preemption decisions," the Fifth Circuit's decision conflicts with the decisions of the Massachusetts, Minnesota, and North Dakota Supreme Courts and with numerous FERC and federal courts of appeals decisions. They recognize that FERC has exclusive jurisdiction to determine the prudence of a utility's failure "to minimize its losses" during construction of a wholesale generating plant and to decide the extent to which shareholders rather than ratepayers should bear some, or all, of the costs of the plant.

FERC routinely exercises this jurisdiction in cases involving generating facilities of interstate electric systems that were either cancelled before completion or completed and operated. When a prudence claim is raised,[16] FERC determines whether the utilities were imprudent in failing to recognize the risks created by an event like the Three Mile Island accident and to minimize their

(footnote continued from previous page)
invalidated by the Council's clear intent collaterally to attack the 17% Grand Gulf allocation. This Court has rejected the Fifth Circuit's reading of *Palmer* v. *Thompson*, 403 U.S. 217 (1971), and has held that such illicit motives invalidate otherwise lawful state action. *Compare Washington* v. *Davis*, 426 U.S. 229, 244 n.11 (1976) & *Hunter* v. *Underwood*, 471 U.S. 222, 231-33 (1985) *with* App. 21A-22A. This rule is fully applicable to federal preemption. *See, e.g., English* v. *General Electric Co.*, 110 S. Ct. 2270, 2278 (1990) (improper "motivation behind the state law" establishes preemption); *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 214-16 (1983) (state action preempted if it was concerned "with the economics of nuclear power," rather than safety).

[16]Under FERC's practice, an investment is presumed to be prudent unless a party raises prudence objections or a serious doubt about the prudence of an investment is otherwise raised. *See, e.g., Minnesota Power & Light Co.*, 11 FERC ¶ 61,312, p. 61,645 (1980).

losses by (1) cancelling the plant at an earlier point in time, (2) selling, or otherwise reducing, their economic interest in the plant, (3) diversifying their power sources by pursuing alternatives to the nuclear plant, or (4) taking other action during construction.[17] Indeed, FERC exercises jurisdiction to review the "prudence of [a utility system's] action in keeping, rather than selling, a [nuclear] plant" even prior to the time the utility seeks to recover those costs under FERC rate schedules.[18]

The Courts of Appeals for the First, Eighth, and District of Columbia Circuits have each upheld FERC's jurisdiction to make these prudence determinations.[19] In turn, at least three state supreme courts have explicitly held that FERC's jurisdiction pre-

[17]*See New England Power Co.*, 8 FERC ¶ 61,054 (1979) (permitting utilities to recover all costs *prudently incurred* prior to cancellation of oil-fired plant and allocating loss between ratepayers and shareholders), *aff'd sub nom., NEPCO Municipal Rate Committee* v. *FERC*, 668 F.2d 1327 (D.C. Cir. 1981); *Southern California Edison Co.*, 8 FERC ¶ 61,198 (1979) (disallowing costs of abandoned plant on ground of imprudence during construction), *aff'd sub nom., Anaheim, Riverside* v. *FERC*, 669 F.2d 799 (D.C. Cir. 1981); *Minnesota Power & Light Co.*, 11 FERC ¶ 61,312 (1980) (same); *Northern States Power Co.*, 17 FERC ¶ 61,196 (1981) (determining amount of prudently-incurred costs and rejecting prudence challenge to cancellation of Tyrone nuclear plant), *aff'd sub nom., South Dakota Public Utilities Comm'n* v. *FERC*, 690 F.2d 674 (8th Cir. 1982); *New England Power Co.*, 32 FERC ¶ 61,112 (1985) (rejecting claims it was imprudent to fail to minimize losses by ending investment in cancelled Pilgrim II plant earlier), *aff'd sub nom., Violet* v. *FERC*, 800 F.2d 280 (1st Cir. 1986); *Union Electric Co.*, 40 FERC ¶ 61,046 (1987) (disallowing costs incurred during construction on grounds of imprudence); *New England Power Co.*, 42 FERC ¶ 61,016 (1988) (recovery of prudent costs of Seabrook nuclear plant). *See also Regulation of Electricity Sales-For-Resale and Transmission Service*, FERC Statutes and Regulation, ¶ 35,519 (1985).

[18]*Arizona Public Service Company*, 27 FERC ¶ 61,185, p. 61,350 (1984); *Arizona Public Service Company*, 23 FERC ¶ 61, 419 (1983), *summarily affirming*, 21 FERC ¶ 63,007 (1982).

[19]*Violet* v. *FERC*, 800 F.2d 280 (1st Cir. 1986); *South Dakota Public Utilities Comm'n* v. *FERC*, 690 F.2d 674 (8th Cir. 1982); *Anaheim, Riverside* v. *FERC*, 669 F.2d 799 (D.C. Cir. 1981). *See Minnesota* v. *FERC*, 734 F.2d 1286 (8th Cir. 1984).

empts states from disallowing FERC-mandated costs on such grounds.

For example, the Massachusetts Supreme Judicial Court so held in *Eastern Edison Company* v. *Department of Public Utilities*, 446 N.E.2d 684 (Mass. 1983). There, Eastern Edison's wholesale generating affiliate (Montoup) had filed a FERC rate schedule that required Eastern Edison to pay its allocated share of the costs of a nuclear plant (Pilgrim II) that was abandoned in 1982, after construction was underway. The Massachusetts utility commission then refused to allow recovery of some of these FERC-mandated costs on the ground that a prudent utility would have minimized its losses by ceasing investment in Pilgrim II on July 1, 1980, and by pursuing alternatives to this nuclear capacity on that date. 446 N.E.2d at 687 n.3; *see Boston Edison Co.*, 46 P.U.R. 4th 431, 471 (Mass. DPU, 1982).

The Massachusetts Supreme Judicial Court reversed on the ground that FERC has exclusive jurisdiction to determine whether the utility system was imprudent in failing to take greater steps to minimize its risks during construction of the plant. 446 N.E.2d at 687-89. It thus held the State's exclusive remedy was to raise this prudence claim in the FERC proceedings (*id.*)—as other states did. *See New England Power Co.*, 32 FERC ¶ 61,112, pp. 61,303-61,305 (1985), *aff'd sub nom., Violet* v. *FERC*, 800 F.2d 280 (1st Cir. 1986).

This was also the holding of the North Dakota Supreme Court in *Northern States Power Co.* v. *Hagen*, 314 N.W.2d 32, 38 (N.D. 1981). There, FERC had rejected an imprudence claim that is the reverse of the Council's claim in this case,[20] and FERC approved rate schedules that allocated costs of an abandoned nuclear plant

[20]The North Dakota, South Dakota, and Minnesota commissions had claimed in FERC proceedings that it was *imprudent* for the Northern States System to have reduced its relative nuclear commitment by cancelling the Tyrone nuclear plant and obtaining coal-fired power instead. *See South Dakota Public Utilities Commission* v. *FERC*, 690 F.2d 674, 677 (8th Cir. 1982).

(Tyrone) among the three affiliated Northern States companies. When the North Dakota public utilities commission refused to recognize these FERC-mandated costs, the North Dakota Supreme Court reversed, holding that FERC has exclusive jurisdiction "to determine the reasonableness and prudence of the Tyrone loss" and that the state commission was limited to raising its imprudence claim by "follow[ing] the remedies available in the proceeding before FERC." 314 N.W.2d at 38.

The Minnesota Supreme Court followed these holdings when the Minnesota utilities commission also barred recovery of the FERC-mandated Tyrone expenses in retail rates. *Northern States Power Co.* v. *Minnesota Public Utilities Commission,* 344 N.W.2d 374 (1984). The Minnesota Supreme Court held that "the state utilities commission is required to treat the [FERC-]allocated abandonment costs as expenses for power purchases in determining the retail rates" and may not examine the prudence of the Northern States' companies in failing to minimize those costs, or otherwise. 344 N.W.2d at 381-82 & n.17. The Minnesota Court held that these issues fall within FERC's exclusive jurisdiction (*id.*)—as has each other comparable post-*Nantahala* and post-*MP&L* decision.[21]

[21]These decisions all recognize that when FERC exercises its jurisdiction to allocate wholesale costs among affiliated utilities in integrated systems—or otherwise to mandate costs—these determinations bind states in setting retail rates. *Kentucky Power Co.* v. *Kentucky Public Service Comm'n,* No. 86-CA-1031-MR (Kentucky Court of Appeals, June 2, 1988); *Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n* 862 F.2d 69, 74 (3d Cir. 1988) (state commission must allow utility to pass through FERC-mandated minimum bill liability to retail customers). Thus, the only circumstances in which lower courts have permitted states to bar recovery of expenses incurred under FERC rate schedules is where FERC regulation has *not* allocated the costs to a particular utility, but has given the utility a choice to obtain the power from one of many sources. *See, e.g., Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n,* 837 F.2d 600 (3d Cir. 1988); *Pike County Light & Power Co.* v. *Pennsylvania Public Utility Comm'n,* 465 A.2d 735 (Penn. Commwlth Ct. 1983). As the Fifth Circuit held, that was not the case here, and the "*Pike County* line of cases" is inapposite here. App. 15A.

III. Resolution Of This Conflict Is A Matter Of Great National Importance.

Resolution of these conflicts is a matter of great national importance. As FERC's prior filings demonstrate, this case presents, if anything, a far more compelling case for Supreme Court review than did the lower courts' decisions in *Nantahala* and *MP&L*.

This case is like *MP&L* and *Nantahala* in that here, as in those cases, the lower court has established an exception to well-settled principles that would subvert the orderly scheme that Congress has created. Under this exception, each FERC wholesale rate determination could be relitigated in each state served by a multistate utility system, and states could interpose "local" parochial interests to preclude the integrated, multistate planning that the Federal Power Act allows. *See Appeal of Sinclair Machine Products, Inc.,* 498 A.2d 696, 702 (N.H. 1985). A state can always claim that a utility should have minimized its losses by cancelling a plant, by selling off high-cost power, or by purchasing lower-cost power—all to satisfy a utility's obligations to "local ratepayers."

However, the Fifth Circuit's decision threatens far greater interference with FERC regulation than did the lower court decisions in *Nantahala* or *MP&L*. Those cases did not question FERC's authority to determine the prudence of utility decision-making during the construction of a plant. *Compare MP&L,* 487 U.S. at 391 (Brennan, J., dissenting). Here, by contrast, the Fifth Circuit held that FERC is without jurisdiction to determine all prudence issues required to establish "just and reasonable" wholesale rates.

Accordingly, FERC has argued, in four separate *amicus curiae* filings in this controversy, that the Council's prudence investiga-

tion and order "frustrate the purposes of FERC's regulation and are preempted."[22]

Finally, here, as in *MP&L*, the existence of pending state proceedings presents no reason to refuse to decide the federal preemption issues. *See MP&L*, 487 U.S. at 370 n.11. As in *MP&L*, the federal preemption issue has been finally decided (*see* pp. 10-11 & n.8, *supra*), and, unless reversed, the Fifth Circuit's decision means that the state proceedings will be confined to state administrative review of the Council's Order and further state law prudence proceedings if the Council's Order is set aside. Because the "critical federal question [is] whether federal law preempts such proceedings," and because this issue is "ripe for review," it should be decided now. *See MP&L*, 487 U.S. at 370 n.11. Indeed, there is a far more compelling case for review of the federal issue here because, unlike *MP&L*, *res judicata* principles would foreclose NOPSI from raising its federal preemption issues in a petition for certiorari from a final judgment in the state case. *See* pp. 10-11 & n.8, *supra*.

[22]Brief for FERC as Amicus Curiae at 4-9, *NOPSI* v. *City of New Orleans*, 782 F.2d 1236 (5th Cir. 1986); Brief for the United States and the FERC as Amici Curiae at 16-17, 25-27, *American Electric Power Co.* v. *Kentucky Public Service Comm'n*, 481 U.S. 1023 (1987) (urging that the petition be denied, but that the pending *NOPSI I* petition be granted); Brief for the United States and the FERC as Amici Curiae at 18 & n.17, *NOPSI* v. *Council of New Orleans*, 109 S.Ct. 2506 (1989) (on petition for writ of certiorari); Brief for the United States and the FERC as Amici Curiae at 17 & n.8, *NOPSI* v. *Council of New Orleans*, 109 S. Ct. 2506 (1989).

CONCLUSION

Because this case is squarely controlled by this Court's decisions in *MP&L* and *Nantahala*, the Fifth Circuit's decision can be summarily reversed. *See Palmer* v. *BRG of Georgia, Inc.*, 111 S. Ct. 401 (1990). Alternatively, the petition for a writ of certiorari should be granted and the case set for oral argument.

Respectfully submitted,

HERSCHEL L. ABBOTT, JR.
DAVID G. RADLAUER
EDWARD H. BERGIN
201 St. Charles Avenue
New Orleans, LA 70170
(504) 582-8000

Of Counsel:

JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE
SIDLEY & AUSTIN

REX E. LEE*
DAVID W. CARPENTER
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

THOMAS O. LIND
317 Baronne Street
New Orleans, LA 70112
(504) 595-2218

Dated: January 15, 1991

*Counsel of Record

APPENDIX

COURT OF APPEALS OPINION
[AUGUST 29, 1990]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-3050

NEW ORLEANS PUBLIC SERVICE, INC.,

Plaintiff-Appellant,

versus

THE COUNCIL OF THE CITY OF NEW ORLEANS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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(August 29, 1990)

Before WISDOM, HIGGINBOTHAM, and DUHÉ, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

New Orleans Public Service, Inc. asks us to reverse the district court's determination that the Council's retail rate order is not "facially" preempted by federal law, specifically a wholesale rate order the Federal Energy Regulatory Commission made under the Federal Power Act. The Council's order prevented NOPSI from recovering, in its retail rate, wholesale costs FERC ordered it to incur as a result of its participation in building the Grand Gulf 1 nuclear reactor in Port Gibson, Mississippi. In the alternative, NOPSI asks us to reverse the district court's decision to stay NOPSI's remaining claims in light of pending state court proceedings. The remaining claims include an allegation that the

stated reasons underlying the Council's order were a pretext for an impermissible attack on FERC's order. We affirm the district court's order, rejecting NOPSI's "facial" preemption challenge, in part because of the reading the Supreme Court gave the Council's order on a previous appeal. We further hold that the district court did not abuse its discretion in staying decision of the remaining claims, although it did not acknowledge the relevance of the Council members' motivation to NOPSI's pretext claim in making that decision. Our reading of the Court's opinion on the previous appeal compels us to conclude that the pretext claim cannot succeed in the face of a determination that the stated reasons underlying the Council's order were sufficiently supported by the evidence; and the state trial court had already determined that they were. There was thus no substantial federal issue remaining in the case, and the district court's order was not otherwise an abuse of discretion.

I.

This case has produced several judicial opinions, including three from this court. At each juncture the case was in a different posture, with different issues. This opinion is no exception. Thus, we repeat the facts for perspective.

A.

NOPSI is a producer, wholesaler, and retailer of electricity, providing its retail services to the city of New Orleans. Along with Arkansas Power and Light, Mississippi Power and Light, and Louisiana Power and Light, it is a wholly owned operating subsidiary of Middle South Utilities, Inc.[1] MSU operates an integrated "power pool" in which NOPSI and the three other power companies transmit the electricity they produce to a central

[1]Since this case began, Middle South Utilities has changed its name to Energy Corporation. The parties refer to it by the old name in the briefs, and, for convenience, we do so as well.

dispatch center, and each draws back the power it needs to meet customer demand.

Through the 1950's and into the 1960's, most of the MSU system's generating plants were fueled with oil or gas. In the late 1960's, MSU sought to meet projected increases in demand by adding coal-fired and nuclear energy powered generating plants. Originally, MSU planned for each of the power companies to construct one or more nuclear facilities. Mississippi Power and Light was charged with constructing two plants at Port Gibson, Mississippi, to be known as Grand Gulf 1 and 2. The Grand Gulf project quickly proved too burdensome for one company, however. MSU created another subsidiary, separate from the power companies, known as Middle South Energy, Inc. to finance, own, and operate the Grand Gulf plants.[2] In 1974, MSE in turn contracted with the power companies to finance the project. The companies agreed to pay for the construction of the plants in exchange for the right to their output. The estimated construction cost at that time was $1.2 billion.

As the project progressed, consumer demand for electric power proved to be much lower than MSU and the power companies had expected. At the same time, regulatory delays, enhanced construction requirements resulting from the Three Mile Island accident, and high inflation led to spiraling costs on the Grand Gulf project. As a result, MSE suspended construction of Grand Gulf 2, although it continued to build Grand Gulf 1. The cost of completing Grand Gulf 1 alone eventually exceeded $3 billion.

The power companies considered various methods to allocate the cost of Grand Gulf in light of these developments. In 1982, MSU filed a Unit Power Sales Agreement with the Federal Energy Regulatory Commission, which set out the shares of Grand

[2]Middle South Energy is now known as Systems Energy Resources, Inc. Again, the parties refer to it by the old name in the briefs and we do so as well.

Gulf 1 output each company was required to purchase in order to pay the construction costs. Arkansas Power and Light, which had finished its own nuclear plants, was not obligated to purchase any Grand Gulf power. Louisiana Power and Light, which had not finished its plant, was obligated to purchase 38.57%. Mississippi Power and Light was obligated to purchase 31.63%, and NOPSI 29.8%. MSU also filed a new System Agreement with FERC, which set forth the terms and conditions for coordinated operations and wholesale transactions among the four companies, but did not deal with the Grand Gulf costs.

FERC assigned the agreements to two separate Administrative Law Judges for the statutorily required task of determining whether they were just and reasonable. Both judges held that the failure to distribute the Grand Gulf costs among all the members rendered the agreements unduly discriminatory; ALJ Head further held that these costs should be allocated in proportion to each company's relative system demand. *Middle South Services, Inc.*, 30 F.E.R.C. ¶ 63,030, pp. 65,170–65,173 (1985) (System Agreement); *Middle South Energy, Inc.*, 26 F.E.R.C. ¶ 63,044, pp. 65,105–65,108 (1984) (Unit Power Sales Agreement) (ALJ Head). FERC consolidated the proceedings for review, and determined that an adjustment of the shares allocated in the Unit Power Sales Agreement was all that was necessary to render both agreements just and reasonable. FERC reduced NOPSI's share from 29.8% to 17%. The decrease did not satisfy the New Orleans City Council, however, which had argued for a 9% share for NOPSI.[3] The D.C. Circuit ordered FERC to reconsider the

[3]FERC found that Grand Gulf 1 had been planned, constructed, and completed to meet the needs of the MSU System "as a whole." *Mississippi Power and Light*, 108 S.Ct. at 2434; 31 FERC ¶ 61,305, pp. 61,651-57 (1985). FERC further found that this was part of a "reasonable" system plan to diversify power sources, so it established rates that would allow MSE to recoup 100% of the Grand Gulf costs from the power companies. FERC then found that the four companies should take shares of the System's total nuclear power in proportion to their relative

(Footnote continued on following page)

allocations. *Mississippi Industries v. FERC,* 808 F.2d 1525, modified on rehearing 822 F.2d 1104 (D.C. Cir.), *cert. denied,* 484 U.S. 985, 108 S.Ct. 500, 98 L.Ed.2d 499 (1987). FERC did so, and reaffirmed them; the D.C. Circuit affirmed that decision. *City of New Orleans v. FERC,* 875 F.2d 903 (D.C. Cir.1989), *cert. denied sub nom. Mississippi v. FERC,* ___ U.S. ___, 110 S.Ct. 1805, 108 L.Ed.2d 936 (1990).

Although its order did not expressly discuss the prudence of the project, FERC implicitly accepted the uncontroverted testimony of MSU executives, who explained why they believed the decision to construct and complete Grand Gulf 1 was sound. It also approved one of the ALJ's findings to that effect. *See Mississippi Power and Light v. Mississippi ex rel. Moore,* 487 U.S. 354, 362, 108 S.Ct. 2428, 2434, 101 L.Ed.2d 322 (1988).

B.

The Council is the local ratemaking body with final authority over NOPSI's retail rates. *See* 16 U.S.C. § 824(b); La.Rev.Stat. Ann. §§ 33:4405, 33:4495 (West 1988); *see also* the New Orleans Home Rule Charter § 4-1604. NOPSI applied to the Council for a retail rate increase to cover the increase in its wholesale rates resulting from the FERC allocation. The increase NOPSI sought would have resulted in an immediate 60% increase in retail rates. The Council denied an immediate rate adjustment, explaining that a public hearing was necessary to determine the "legality" and prudence of NOPSI's decision to enter the Grand Gulf contracts.

(Footnote continued from previous page)
demand for all energy generated by the system. *Mississippi Power and Light,* 108 S.Ct. at 2435. As the Council points out, NOPSI's demand is 9% of the total system demand. Thus, FERC required it to bear 9% of the System's total nuclear power costs. Since NOPSI had no nuclear plant of its own, it had to bear 17% of the Grand Gulf costs in order to bear 9% of the total nuclear power costs.

NOPSI responded by filing an action in the district court, requesting injunctive and declaratory relief, on the theory that FERC's order required the Council to allow NOPSI to pass all of the allocated costs to its retail customers. The district court dismissed the case, holding that under the Johnson Act, 28 U.S.C. § 1342, it lacked jurisdiction to proceed, and noted that if it had had jurisdiction, it would have abstained pursuant to *Burford v. Sun Oil Co.,* 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). We reversed, but then affirmed on panel reconsideration because we decided abstention was proper under both *Burford* and *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). *NOPSI v. The City of New Orleans,* 782 F.2d 1236, *modified on panel rehearing,* 798 F.2d 858 (5th Cir.1986) (*NOPSI I*).

On October 10, 1985, while *NOPSI I* was pending before us, the Council began its investigation. In a resolution, the Council said it would examine all aspects of NOPSI's participation in the Grand Gulf projects, including Grand Gulf's impact on other power supply opportunities, and NOPSI's efforts to minimize its total cost exposure for the Grand Gulf project. The resolution specifically provided that, in determining the appropriate retail rate increase, the Council would not seek to invalidate any of the agreements surrounding Grand Gulf 1 or to order NOPSI to pay MSE a wholesale rate other than that approved by FERC.

In November 1985, with *NOPSI I* still pending before us, NOPSI filed *NOPSI II* in the district court, seeking to enjoin the Council from preventing the pass-through. The district court dismissed on ripeness grounds, and in the alternative abstained. We affirmed on the ripeness issue. *NOPSI v. The Council of the City of New Orleans,* 833 F.2d 583 (5th Cir.1987).

The Council completed its investigation on February 4, 1988, and entered a final order disallowing some of the requested in-

crease. The order prevented NOPSI from passing through $135 million of the Grand Gulf costs. This meant that, instead of passing through the full 17% FERC required it to bear, NOPSI could pass through only 14%, the amount the Council had argued NOPSI should bear in the FERC proceedings.

NOPSI then filed this action (*NOPSI III*) in the district court, and a parallel state action challenging the order. In the district court, NOPSI argued the Council's order was preempted under *Nantahala Power and Light Co. v. Thornburg,* 476 U.S. 953, 106 S.Ct. 2349, 90 L.Ed.2d 943 (1986). The district court abstained under *Burford* and we affirmed, holding abstention proper under both *Burford* and *Younger.* The Supreme Court granted certiorari and reversed, holding abstention improper on either ground. *NOPSI v. The Council of the City of New Orleans,* ___ U.S. ___, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989).

On remand, NOPSI again argued that the Council's order was preempted, because on its face it impermissibly contradicted the FERC order; or alternatively, that the Council's reasons for denying a pass-through were a pretext to attack the FERC allocation. The district court held that the Council's order was not "facially" preempted, and stayed the rest of the case because the Louisiana trial court had already issued a judgment in the Council's favor in the parallel state proceedings. The state trial court held that the Council's order was supported by substantial evidence. The matter is now pending in the state court of appeals. The district court rested its decision to stay on *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), and *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation,* 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). The district court did not consider the relevance of the Council members' motivation to NOPSI's pretext claim in any portion of its opinion. NOPSI brought this appeal.

II.

We first consider whether the district court properly determined that the Council's order was not "facially" preempted. The preemption doctrine is not without its difficulties. At least as a point of departure it is fair to observe that federal law may preempt state law in three ways. First, Congress may expressly define the extent to which it intends to preempt state law. Second, Congress may only signal intent to occupy an area. Third, state laws that conflict with federal laws are preempted, even if Congress has not expressly preempted them or otherwise signaled its intent to occupy the area. *Michigan Canners and Freezers Association v. Agricultural Marketing and Bargaining Board,* 467 U.S. 461, 104 S.Ct. 2518, 81 L.Ed.2d 399 (1984); *Burlington Northern R. Co. v. Public Utilities Commission of Texas,* 812 F.2d 231 (5th Cir. 1987). "Facially" preempted state laws, as the parties use the term, are those which the court can tell are preempted in one of these three ways simply by looking at the federal law, the challenged state law, and the cases applying them.

The Council argues that the Supreme Court foreclosed this claim in *NOPSI III.* As the Council concedes, the Court did not do so explicitly. Indeed, the Court reversed our holding on *Burford* abstention because the facial preemption challenge, limited as it was to the "four corners of the Council's retail rate order," would not unduly intrude into state processes or undermine the state's ability to maintain uniformity in retail rate regulation. 109 S.Ct. at 2515. Far from foreclosing the claim, the Court reversed our decision because we did not allow the district court to consider it. The Court's ensuing discussion of *Younger* abstention, however, generates some confusion. NOPSI argued that, even if *Younger* should apply to state retail rate proceedings, abstention in this case was inappropriate because a stay would cause NOPSI irreparable harm. Irreparable harm sufficient to preclude a stay occurs when the state law sought to be enforced is flagrantly and patently violative of express constitutional provisions. NOPSI argued that the same rule should apply if the state law similarly

violated federal statutes and regulatory orders, and that the Council's order was such a state law. The Court responded:

> [W]e do not have to decide the matter here, since the proceeding and order at issue do not meet that description. The Council has not sought directly to regulate interstate wholesale rates; nor has it questioned the validity of the FERC-prescribed allocation of power within the Grand Gulf system, or the FERC-prescribed wholesale rates; nor has it reexamined the prudence of NOPSI's agreement to participate in Grand Gulf 1 in the first place. Rather, the Council maintains that it has examined the prudence of NOPSI's failure, after the risk of nuclear power became apparent, to diversify its supply portfolio, and that finding that failure negligent, it has taken the normal ratemaking step of making NOPSI's shareholders rather than the ratepayers bear the consequences. Nothing in this is directly or even indirectly foreclosed by the federal statute, the regulations implementing it, or the case law applying it. There may well be reason to doubt the Council's necessary factual finding that NOPSI would have saved money had it diversified. But we cannot conclusively say it is wrong without further factual inquiry —and what requires further factual inquiry can hardly be deemed "flagrantly" unlawful for purposes of a threshold abstention determination.

109 S.Ct. at 2517. We are of course bound by the Court's characterization of the order. It is plain, however, that the Court held only that the order was not "flagrantly" unlawful for *Younger* abstention purposes; it did not hold the facial preemption claim was foreclosed. We therefore are required to consider that claim on the merits. In so doing, we must, and we will, look to the Court's characterization for such guidance as it provides.

A.

NOPSI's facial preemption claim, as well as its pretext claim, is grounded in an aspect of the filed rate doctrine, which the Court established in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 71 S.Ct. 692, 95 L.Ed. 912

(1951), in dismissing a power company's challenge to the reasonableness of wholesale rates it had paid in the past. The Federal Power Commission, acting pursuant to its authority under the Federal Power Act, had determined that the challenged rates were reasonable, and the Court held that the FPC's determination settled the matter. The Court said that federal courts had no power to set a rate other than that determined by the FPC, except upon direct review of the FPC's order, and the case was not in that posture. 341 U.S. at 251–252, 71 S.Ct. at 695–696.

The Court has since held that this aspect of the filed rate doctrine applies to state courts as well, not as a rule of administrative law, as in the federal context, but rather as a means of enforcing the Supremacy Clause. *See, e.g., Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981) (state court could not allow utility to charge a wholesale rate not approved by the FPC because the state court thought the FPC would have approved the rate as reasonable; the determination of reasonableness belonged solely to the FPC).

Several state courts have held that a state utility commission setting retail rates must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price. *See, e.g., Narragansett Electric Co. v. Burke,* 119 R.I. 559, 381 A.2d 1358 (1977); *Public Service Co. of Colorado v. Public Utilities Commission,* 644 P.2d 933 (Colo.1982); *United Gas Corp. v. Mississippi Public Service Commission,* 240 Miss. 405, 127 So.2d 404 (1961). These courts viewed their decisions as applications of the filed rate doctrine. The Court has approved these cases, characterizing the decisions as "properly driven by the need to enforce the exclusive jurisdiction vested by Congress in FERC over the regulation of interstate wholesale utility rates." *Nantahala Power & Light Co. v. Thornburg,* 476 U.S. at 966, 106 S.Ct. at 2356. It is plain, then, that if the purpose or effect of the Council's order is to redetermine NOPSI's share of Grand Gulf, even if only for the purpose of setting retail rates, it is preempted by FERC's

order. *Nantahala* and *Mississippi Power and Light Co. v. Mississippi ex rel. Moore,* 487 U.S. 354, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988) guide our analysis.

In *Nantahala,* Nantahala Power and Light Co. and Tapoco, wholly owned subsidiaries of Alcoa, owned hydroelectric plants, which they allowed the TVA to operate. In exchange, the TVA provided them jointly with a fixed supply of low-cost power. Nantahala also bought high-cost power from the TVA's power grid. An agreement between Nantahala and Tapoco gave Nantahala 20% of the low-cost power, and Nantahala calculated its wholesale and retail rates on that basis. FERC reviewed this agreement in a wholesale ratemaking proceeding, and determined that the agreement was unfair and that Nantahala was entitled to 22.5% of the low cost power. FERC ordered Nantahala to use that figure in calculating its wholesale rates. When Nantahala later applied to the North Carolina Utilities Commission for a retail rate increase, the NCUC essentially determined that the agreement was more unfair to Nantahala than FERC said it was, and that Nantahala was entitled to 24.5% of the low cost power. It required Nantahala to calculate its retail rates on that basis. The Court, citing the state court cases noted above, held the NCUC's order preempted by FERC's order, because "a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority." 476 U.S. at 966, 106 S.Ct. at 2356.

The Court noted that, in *Narragansett* and *Public Service Co. of Colorado,* the state courts held that an increase in FERC-ordered wholesale rates need not always lead to a corresponding increase in retail rates. Retail rates might increase less sharply than wholesale rates, or even go down, if the utility's costs *other than* those attributable to the FERC-approved wholesale rates decrease. *Narragansett,* 381 A.2d at 1363; *Public Service Co.,* 644 P.2d at 941. The Court in *Nantahala* called this qualification

"perfectly sensible," but said that it did not apply there, because the NCUC did not rest its decision on that basis, but on its disapproval of the FERC-imposed rate. 476 U.S. at 968, 106 S.Ct. at 2357.

The Court also noted that, in certain circumstances, a utility's purchase of a particular quantity of high cost power at FERC-approved rates might be unreasonable, if lower cost power were available from another source. *Id.* at 972, 106 S.Ct. at 2359. Some courts have denied pass-throughs for exactly that reason. *See Pike County Light & Power Co. v. Pennsylvania Public Utility Commission,* 77 Pa.Commw. 268, 465 A.2d 735 (1983); *Kansas-Nebraska Natural Gas Co. v. State Corporation Commission,* 4 Kan.App.2d 674, 610 P.2d 121 (1980); *Kentucky-West Virginia Gas Co. v. Pennsylvania Public Utilities Commission,* 837 F.2d 600 (3d Cir.1988). The Court determined, however, that this line of cases had no application where FERC has not only determined the rate the utility must pay for the power, but also the amount of the power the utility must purchase. In that case, there is no lower cost power available that can lessen the amount of power the utility must buy at FERC rates. 476 U.S. at 972–973, 106 S.Ct. at 2359–2360.

Mississippi Power and Light involved the same FERC allocation that is at issue here. The UPSA assigned MP & L a 31.63% share of Grand Gulf 1's costs; FERC changed that to 33%. The Mississippi Public Service Commission originally refused to allow MP & L to pass through any of these costs, but then reversed itself and allowed MP & L to pass all of them through. It did so because it concluded that MP & L would otherwise become insolvent. The Mississippi Supreme Court reversed that order, holding that the Public Service Commission had no authority under state law to allow the pass-through without conducting a prudence review, and that such a review was not preempted by federal law. The court remanded the case to the Public Service Commission to "determine whether MP & L, [MSE], and MSU acted reasonably when they constructed Grand Gulf 1, in light

of the change in demand for electric power in this state and the sudden escalation of costs." *Mississippi ex rel. Pittman v. Mississippi Public Service Commission,* 506 So.2d 978, 987 (Miss. 1987).

The Court reversed, holding that "our decision in *Nantahala* rests on a foundation that is broad enough to support the order entered by FERC in this case and to require the MPSC to treat MP & L's FERC-mandated payments for Grand Gulf costs as reasonably incurred operating expenses for the purpose of setting MP & L's retail rates." 108 S.Ct. at 2438. The Court said that *Nantahala* rested on three "fundamental principles concerning the preemptive impact of federal jurisdiction over wholesale rates on state regulation": (1) that FERC has exclusive authority to determine the reasonableness of wholesale rates; (2) that FERC's exclusive jurisdiction applies not only to rates, but also to power allocations that affect wholesale rates; and (3) that states may not bar regulated utilities from passing through to retail consumers FERC-mandated wholesale rates. 108 S.Ct. at 2439. Those principles prevented the NCUC's action in *Nantahala,* and the Court held they prevented the MPSC from conducting the prudence review ordered by the Mississippi Supreme Court. *Id.* The Court held that the *Pike County* line of cases noted above had no application, just as it had none in *Nantahala,* because FERC had determined the amount of Grand Gulf power MP & L had to buy. *Id.* 108 S.Ct. at 2440. The Court also rejected an argument that FERC did not have jurisdiction to determine the reasonableness of MP & L's decision to participate in Grand Gulf. *Id.* 108 S.Ct. at 2440–2441.[4]

In sum, then, there were several things the Council was not entitled to do in the prudence inquiry. It could not base any disallowance on NOPSI's purported imprudence in deciding to participate in Grand Gulf in the first place. That is the holding

[4]The Court's reasons for rejecting this argument were a bit murky. It stated that the reason FERC did not consider its jurisdiction was because the parties did not raise it, not because jurisdiction was lacking. Justice Scalia, concurring in the judgment, and Justice Brennan, dissenting, wrote separately to discuss the issue more thoroughly.

of *Mississippi Power and Light*. The Council could not, of course, challenge the FERC price as inappropriate. That is the point of the entire line of filed rate doctrine cases. The Council also could not penalize NOPSI for buying an unreasonably high amount of Grand Gulf power, because FERC allocated the power NOPSI had to buy. NOPSI had no legal right to take any less. *Nantahala* established that the *Pike Co.* line of cases did not apply to facts like ours; *Mississippi Power and Light* established specifically that they do not apply to our facts. We therefore must determine exactly what the Council did, and whether, in light of the cases, it was entitled to do it.

B.

We have noted that the Supreme Court has already characterized the Council's order as follows:

> The Council has not sought directly to regulate interstate wholesale rates; nor has it questioned the validity of the FERC-prescribed allocation of power within the Grand Gulf system, or the FERC-prescribed wholesale rates; nor has it reexamined the prudence of NOPSI's agreement to participate in Grand Gulf 1 in the first place. Rather, the Council maintains that it has examined the prudence of NOPSI's failure, after the risk of nuclear power became apparent, to diversify its supply portfolio, and that finding that failure negligent, it has taken the normal ratemaking step of making NOPSI's shareholders rather than the ratepayers bear the consequences.

NOPSI III, 109 S.Ct. at 2517. Even were we convinced otherwise, we are bound by the Court's characterization of the order. We agree with the Court's characterization in any event. All that is left, then, is to determine whether the foregoing preemption cases permit the Council to make this order.

C.

Nantahala and *Mississippi Power and Light* reaffirmed the well-established principle that if FERC has jurisdiction over a

subject, states cannot have jurisdiction over it. *Mississippi Power and Light* established that FERC had jurisdiction to determine whether the various utilities acted prudently in deciding to participate in the Grand Gulf venture, and that the states were therefore precluded from conducting prudence inquiries on that subject. The order before us presents a variation of that question. We must decide whether FERC has jurisdiction to determine whether NOPSI acted prudently once the Grand Gulf project was underway. To do so, we must determine whether the Federal Power Act grants FERC this jurisdiction.

The first step in making this determination is to decide whether FERC has asserted this jurisdiction. We defer to FERC's construction of the act if it does not violate the act's plain meaning and is a reasonable interpretation of silence or ambiguity. *See Mississippi Power and Light,* 108 S.Ct. at 2443 (Scalia, J., concurring in the judgment) (citing *K Mart Corp. v. Cartier, Inc.,* 486 U.S. 281, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). In *Mississippi Power and Light,* Justice Scalia, concurring in the judgment, and Justice Brennan, dissenting, debated whether this presumption applies to FERC's assertions of jurisdiction under the act. The majority's position on this point is not clear. It concluded that FERC did have jurisdiction over that particular prudence question. We need not enter this thicket here, however, for it is plain that FERC did not assert jurisdiction to determine NOPSI's prudence in not acting to minimize its losses.[5]

[5]NOPSI argues vigorously that the Council's order essentially relitigates several matters FERC had already decided. Appellant's brief at 43–48. We have already rejected this argument, relying on *NOPSI III.* See part II.B of this opinion. If the Council's order did this, the Court in *NOPSI III* would not have been able to conclude that nothing in the order was directly or indirectly foreclosed by the FERC order. In any event, the opposite conclusion still would not compel us to hold FERC asserted jurisdiction to decide NOPSI's prudence in not acting to mini-

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We therefore must determine only whether this is a matter that Congress has nevertheless committed to FERC's exclusive jurisdiction. In doing so, we must presume that state law is not preempted, as this is an area traditionally regulated by the states under their historic police powers. Courts must assume that these state powers were not to be superseded by the Act in the absence of clear and manifest Congressional purpose. *California v. ARC America Corp.,* 490 U.S. 93, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989); *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). We are pointed to nothing to suggest that Congress has done so.[6] Indeed, finding such jurisdiction would work the result Justice Brennan feared in *Mississippi Power and Light,* that is, to "divest states of authority to determine the prudence of costs incurred by retail utilities whenever those utilities belong to an interstate pool." 108 S.Ct. at 2449 (Brennan, J., dissenting). We would require a firmer statement of intent to preempt before finding such intrusive federal jurisdiction to exist.

Further, we are convinced that the Court in *NOPSI III* did not believe the Council could not regulate NOPSI's activities in this regard. It said that nothing in the Council's order was directly or even indirectly foreclosed by prior preemption decisions. *NOPSI III,* 109 S.Ct. at 2517. Indeed, this seems analogous to the excep-

mize its losses. We would only be compelled to conclude that some of the issues that were relevant to FERC's wholesale rate proceeding were also relevant to the Council's proceeding. Of course, in that case, the Council would have been bound by FERC's resolution of those issues.

[6]Congress of course need not expressly grant FERC the power to preempt a particular state action. Rather, when state law is alleged to be preempted by federal regulation, the court must determine whether the agency action is preemptive (making the same inquiry as for a statute); the agency's choice to act preemptively will be upheld whenever the action "represents a reasonable accommodation of . . . policies that were committed to the agency's care by the statute." *City of New York v. F.C.C.,* 486 U.S. 57, 63, 108 S.Ct. 1637, 1642, 100 L.Ed.2d 48 (1988). Nevertheless, the grant of regulatory authority can itself be preemptive. *See Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988).

tion the Court called "perfectly sensible" in *Nantahala,* 476 U.S. at 968, 106 S.Ct. at 2357; *see Narragansett,* 381 A.2d at 1363; *Public Service Co.,* 644 P.2d at 941. If states may deny pass throughs because costs have gone down in other areas, it seems logical that they should be able to deny them because costs would have gone down if the utility had not been imprudent. We therefore hold the order is not facially preempted.

III.

As we have noted, NOPSI has not rested its preemption argument solely on the Council order's facial invalidity. NOPSI also argues that, whatever the order's facial validity, the reasons given for denying the pass through were pretexts for the Council members' true, but impermissible, objective of attacking both the FERC allocation and NOPSI's imprudence in participating in Grand Gulf in the first place. We are unable to locate an express reference to this aspect of NOPSI's argument in the district court's opinion.[7]

In its brief and at oral argument, the Council urged that NOPSI never raised this pretext claim in its complaint. Whether we would reach the same conclusion on a fresh reading of the

[7]As we will explain, the district court premised its decision to stay in large part upon its conclusion that there were no substantial federal issues remaining in the case, once it had resolved the facial preemption challenge. The district court said that the disposition of the facial challenge "leaves only the question of whether the Council's finding is supported by the evidence." At 997. At oral argument, the parties and the panel proceeded on the assumption that the district court ignored the pretext claim. On further reflection and examination of the opinion, we cannot conclusively say that is so. It is equally plausible to read the district court's language to mean that the court thought the pretext claim involved only an analysis of the sufficiency of the evidence, a conclusion with which we agree. We can only conclusively say that the district court did not expressly refute the argument that the pretext claim must involve an evaluation of the Council's motivation in making the rate order.

complaint is not relevant, however, because the Supreme Court has already held that NOPSI did raise this claim in its complaint. *NOPSI III*, 109 S.Ct. at 2515 ("It is true that in its initial complaint, NOPSI asserted, as an alternative to its facial preemption challenge, that the rate order's nominal emphasis on NOPSI's failure in 1979–80 to diversify its power supply by selling off a portion of its Grand Gulf allocation was merely a cover for the determination that the original Grand Gulf investment was unwise").

The Council further argued that the district court's decision to stay was justifiable under *Colorado River* and *Moses H. Cone Memorial Hospital*, despite the failure to consider expressly the relevance of motivation to the pretext claim. We review the decision to stay only for an abuse of discretion. *Moses H. Cone Memorial Hospital,* 460 U.S. at 19, 103 S.Ct. at 938; *Brown v. Link Belt Division of FMC Corp.*, 666 F.2d 110 (5th Cir. 1982). Under *Colorado River* and *Moses H. Cone Memorial Hospital*, the district court was required to consider whether the case presented exceptional circumstances, in which considerations of wise judicial administration—in particular the need to conserve judicial resources and promote comprehensive disposition of litigation—counselled against exercising jurisdiction. *Colorado River*, 424 U.S. at 817, 96 S.Ct. at 1246. Several factors guide this decision, none of which is necessarily determinative. *Id*. The court was required to consider the convenience of the federal forum, the desirability of avoiding piecemeal litigation, the order in which the federal and state forums obtained jurisdiction and the progress of the litigation in each, whether there existed a *res* over which one forum or both had asserted jurisdiction, which forum's law provided the rule of decision in the case, and the adequacy of the state court proceedings to protect NOPSI's rights. *Colorado River*, 424 U.S. at 819–820, 96 S.Ct. at 1247–1248; *Moses H. Cone Memorial Hospital*, 460 U.S. at 24–27, 103 S.Ct. at 941–943. The court was not to apply these factors as a mechanical checklist, but

rather to balance carefully the factors important in the particular setting of the case. It was also to weight the balance heavily in favor of exercising jurisdiction. *Moses H. Cone Memorial Hospital*, 460 U.S. at 16, 103 S.Ct. at 937.

The Council maintained that, as long as there was sufficient evidence to support the Council's stated reasons for denying the pass through, the pretext claim must fail, that there was no difference between the pretext claim and the state law challenges to the order's validity. Since the state trial court had already decided the state law challenges, and thereby already passed, albeit indirectly, on the pretext claim, the Council contended the district court properly concluded that, while federal law technically provided the rule of decision, there were no substantial federal issues remaining in the case, so the court was not compelled to exercise its jurisdiction on that basis. The Council further argued that the district court's order was not otherwise an abuse of discretion.

A.

In *NOPSI III*, the Court described the pretext claim as follows:

> Unlike the facial challenge, [the pretext] claim cannot be resolved on the face of the rate order, because it hinges largely on the plausibility of the Council's finding that NOPSI should have, and could have, diversified its supply portfolio and thereby lowered its average wholesale costs. See n. 2, supra. Analysis of this pretext claim requires an inquiry into industry practice, wholesale rates, and power availability during the relevant time period, an endeavor that demands some level of industry-specific expertise.

109 S.Ct. at 2515. The reference in this language to the earlier footnote provides further guidance. In that footnote, the Court quoted from the prior district court opinion, in which the district court expressed doubts as to the validity of the Council's stated reasons for denying the pass through:

> Adverting to the merits, the District Court commented: "[T]he Council faults NOPSI not for buying a 'pig in a poke' but for failing to find a sucker to buy it when the faux pas became apparent."[11]
>
> [11]P.T. Barnum once said of suckers: 'There's one born every minute.' This court, however, is not ready to assume there are many, if any, such suckers purchasing electricity in the wholesale market today. Indeed, this court is somewhat mystified by the Council's logic in arriving at the $135 million disallowance in the Rate Order. In the Rate Order, the Council simply concluded that since [NOPSI's President] said so, savings were actually possible. Then, the Council seemingly pulled from thin air a figure of 8% for the prudence disallowance. However, the Council, and in this case, everyone else knows that the 8% figure was not pulled from thin air but represents the difference between FERC's 17% allocation and what NOPSI consistently claims as its relative share of the [Middle South] system [and what the Council advocated unsuccessfully in the FERC proceeding], i.e., 9%. Thus, the disallowed costs bear no apparent relationship to the savings NOPSI is said to have foregone. [sic] Must not the 'savings' posited as the reason for the disallowance be at least possible in the actual economic market? Furthermore, must not the ultimate disallowance bear some rational relationship to the possible savings which support the disallowance? These questions must be resolved on another day in another court.

109 S.Ct. at 2512, n. 2. This language suggests that the Court meant the pretext claim is inevitably a review of the sufficiency of the evidence to support the Council's stated reasons for denying the pass through. But NOPSI argues the language should be read to require a further inquiry, a determination of the Council members' motivation in making the order, regardless of the evidence. We disagree. We have said that, facially, the Council's order was a valid exercise of its power over retail rates. If there is an adequate basis in the record to support the Council's action, federal courts may not invalidate it on a suspicion that the Council members' motives were improper. See *Fletcher v. Peck*, 6 Cranch. 87, 128–130, 3 L.Ed. 162 (1810); *Arizona v. California*, 283 U.S. 423, 455 n. 7, 51 S.Ct. 522, 526 n. 7, 75 L.Ed. 1154 (1931); *United States v. O'Brien*, 391 U.S. 367, 382–386, 88 S.Ct.

1673, 1681–1684, 20 L.Ed.2d 672 (1968); *Palmer v. Thompson,* 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971). Of course, the evaluation of the sufficiency of the evidence must be made with an eye to the circumstances of the case; but beyond that we cannot go. We do not read *NOPSI III* to require otherwise.

Having reached this conclusion, we cannot reverse the district court for failing expressly to consider the relevance of motivation to the pretext claim in deciding to stay its hand. The pretext claim has little functional difference from the state court's sufficiency of the evidence review, and motivation is not relevant. We therefore can reverse only if the district court's order was otherwise an abuse of discretion.

B.

Not all of the factors set out in *Colorado River* and *Moses H. Cone* are important in every case, and only some are important here. In this case, the forums are equally convenient,[8] there is no *res,* and the question of the order in which jurisdiction was actually obtained is confusing and largely academic. We have already determined that there are no substantial federal issues remaining in the case. We therefore focus on the factors that are important

[8]The district court noted that "[t]he factor of convenience usually refers to ease of access to sources of proof, availability of compulsory process, and enforceability of judgments," and that in this sense, neither forum in this case was more convenient than the other. But the court still found the federal forum inconvenient because "it is certainly inconvenient for the parties to pursue two concurrent, parallel litigations in two courts within the same parish in Louisiana." At 996. This approach unnecessarily confuses the analysis. The Court in *Colorado River* plainly considered convenience to mean roughly what it does in *forum non conveniens* analysis, as its reference to *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947) indicates. 424 U.S. at 818, 96 S.Ct. at 1246. The other difficulties of proceeding in parallel forums—waste of judicial resources, duplication of effort, expense—are more properly considered in determining whether it is appropriate to stay in order to avoid piecemeal litigation.

—the progress of the proceedings in each forum, the adequacy of the state courts to protect NOPSI's rights, and avoiding piecemeal litigation.

The district court was correct that the state proceeding had progressed further than the federal one, since the state trial court had already rendered judgment on the merits of the sufficiency of the evidence claim. The Council's argument that the state trial court's judgment is entitled to res judicata effect is contrary to Louisiana law, see La.Civ.Code Art. 3556(31) (West 1990); but the fact that the state trial court has rendered judgment nonetheless weighs in favor of a stay. There is little to be gained from rehashing the same evidence in another forum.

The state courts are of course quite adequate to protect NOPSI's rights. Indeed, they are more experienced in reviewing retail rate orders than are federal courts. This factor also weighs in favor of a stay.

Colorado River was based primarily upon avoiding piecemeal litigation. Colorado had established a comprehensive system for adjudicating water rights, and it was plain that the relevant federal policies in the McCarran Act favored adjudicating water rights in a single, unified proceeding. 424 U.S. at 819–820, 96 S.Ct. at 1247–1248. The Johnson Act just as clearly evidences a federal purpose to facilitate review of state court retail rate orders in unified proceedings, and indeed in unified proceedings in state court. 28 U.S.C. § 1342; *see Gulf Water Benefaction Co. v. Public Utility Commission,* 674 F.2d 462 (5th Cir.1982). We have held the Johnson Act not applicable to these proceedings, because the preemption claim was based on the Federal Power Act as well as the Constitution, *NOPSI I,* 782 F.2d at 1242–1243; but that holding does not diminish the federal interest in state court resolution of challenges to state rate orders. Further, it is plain that all necessary parties are before the state court and all claims can be adjudicated there. *See Brillhart v. Excess Insurance Co. of Ameri-*

ca, 316 U.S. 491, 495, 62 S.Ct. 1173, 1175, 86 L.Ed. 1620 (1941). The district court thus properly concluded that the desire to avoid piecemeal litigation counselled in favor of a stay.

The district court's discretion to stay decision pursuant to *Colorado River* is perhaps not as broad as was once thought. Compare *Will v. Calvert Fire Insurance Co.,* 437 U.S. 655, 98 S.Ct. 2552, 57 L.Ed.2d 504 (1978) (plurality opinion) and *Moses H. Cone Memorial Hospital,* 460 U.S. at 16–19, 103 S.Ct. at 937–939. The district court of course has broad control over its docket, but that control is limited by the virtually unflagging obligation to exercise its jurisdiction. *See Moses H. Cone Memorial Hospital,* 460 U.S. at 19, 103 S.Ct. at 938. Here, however, three factors counsel strongly in favor of a stay, and there are no substantial federal questions remaining in the case. Under these circumstances, we cannot say the district court abused its discretion.

IV.

Finding no merit in NOPSI's facial preemption challenge, and that the district court properly stayed the pretext challenge, we affirm the judgment of the district court.

AFFIRMED.

DISTRICT COURT OPINION AND ORDER [JANUARY 4, 1990]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS PUBLIC SERVICE, INC. *VERSUS* THE COUNCIL OF THE CITY OF NEW ORLEANS, ET AL	CIVIL ACTION NO. 88-559 SECTION "D" (2)

Before the court is the Motion of Defendants, the Council of the City of New Orleans, et al, to Dismiss on Grounds of *Res Judicata.* Plaintiff, New Orleans Public Service, Inc. ("NOPSI"), opposes this Motion. The Motion, set to be heard on Wednesday, December 13, 1989, is before the court on briefs without oral argument.

The issue of *res judicata* need not be considered at this time since the court, on its own motion, has decided to stay this matter due to the progress of the concurrent state court proceedings. A decision regarding a stay requires the court to examine the following two issues: (1) is the Council's Rate Order facially preempted by the Federal Energy Regulatory Commission's ("FERC") allocative decree; and (2) if the Order is not facially preempted, should the court stay this matter in deference to the parallel state court proceeding which is currently on appeal to the Louisiana Court of Appeal. Each issue will be discussed in turn.

1. In *New Orleans Public Service v. Council of City of New Orleans,* 109 S.Ct. 2506, 2515 (1989), the Supreme Court noted that the federal preemption issue in this litigation should be decided only by reviewing the Council's Rate Order. The Court held that "no inquiry beyond the four corners of the Council's retail rate order is needed to determine whether it is facially preempted by FERC's allocative decree . . . ." *Id.* at 2515. Facially, the Council's Order is not preempted by federal law. The Council noted that "neither the purpose nor the effect of this prudence

investigation is to interfere with interstate commerce." Prudence Investigation, pp. 41-2. Instead, the Council merely sought "to review the prudence of the management of NOPSI . . . as to the action it took and could have taken, so as to ensure that only prudently incurred costs are passed on to New Orleans' consumers in their local electric rates." *Id.* at 44. The Council concluded:

> Were we to adopt a different allocation formula as the basis for retail rates than that adopted by the FERC for wholesale rates, such an action would certainly be in derogation of the FERC's authority and violate the Supremacy Clause of the Constitution. *Nantahala Power & Light Co. v. Thornburg,* 106 S.Ct. 2349 (1986). But we do not do so. The inquiry here falls within the area reserved by *Nantahala*—i.e., whether there were alternatives by which NOPSI could have curtailed its costs and risks with respect to Grand Gulf. Moreover, there was no independent issue of the prudence of management in the *Nantahala* case as, in contrast, there is here. *Id.* at 48.

An examination into the "four corners" of the Council's Order reveals that it is not facially preempted. The Council's decision did not question the validity of FERC's allocative decree, and the Council did not attempt to regulate interstate utility rates. Instead, the Council's inquiry focused solely upon whether NOPSI prudently managed its participation in Grand Gulf. Accordingly, this court concurs with the Louisiana Civil District Court by holding that the Council's Rate Order is not facially preempted by FERC's allocative decree.

2. Since this matter is not preempted, the Court will now address whether a stay is appropriate regarding NOPSI's claim that the Council's Order is unsupported by the evidence. The decision of whether to stay federal proceedings because of parallel state court litigation is committed to a district court's discretion. A court's decision to stay can only be reversed for an abuse of discretion. *Brown v. Link Belt Division of FMC Corp.*, 666 F.2d 110, 115 (5th Cir. 1982); *Illinois Bell Telephone Co. v. Illinois*

Commerce Commission, 740 F.2d 566, 569 (7th Cir. 1984). This discretion stems from a district court's "inherent power to control its docket." *Sea Colony, Inc. v. Alcan Aluminum Corp.*, 653 F. Supp. 1323, 1326 (D.Del. 1987). In order to stay a proceeding, two prerequisites must be satisfied. First, the state and federal proceedings must be parallel. *Glen Oaks Utilities, Inc. v. City of Houston*, 280 F.2d 330 (5th Cir. 1960); *Gilbane Bldg. Co. v. Nemours Foundation*, 568 F. Supp. 1085, 1089 (D.Del. 1983). The mere fact that a parallel action between the parties is pending in state court is not a bar to the federal proceedings. *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 14, 103 S.Ct. 927, 936 (1983). However, "parallel actions may lead to . . . 'a grand waste of efforts by both the courts and parties.' " *Illinois Bell*, 740 F.2d at 569, quoting, *MicroSoftware Computer Systems v. Ontel Corp.*, 686 F.2d 531, 538 (7th Cir. 1982).

Second, adequate grounds must exist to justify granting the stay. In *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236 (1976), the Court held that under exceptional circumstances, a stay may be appropriate based upon "considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.' " *Id.* at 817, 96 S.Ct. at 1246, quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183, 72 S.Ct. 219, 221 (1952). The *Colorado River* Court noted that the "general principal is to avoid duplicative litigation." 96 S.Ct. at 1246. The Court then delineated several factors which can justify a stay, holding that "[n]o one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required." *Id.* at 819, 96 S.Ct. at 1247. The factors enunciated by the court include: (1) the inconvenience of the federal forum; (2) the desirability of avoiding piecemeal litigation; (3) the order in which the proceedings were initiated; and (4) the presence of a *res* or property over which jurisdiction has

been asserted. *Id.* at 819-20, 96 S.Ct. at 1246. In *Moses H. Cone*, the Court added two additional factors: (1) whether federal law provides the rule of decision on the merits; and (2) the adequacy of state court proceedings to protect the plaintiff's rights. 460 U.S. at 24-27, 103 S.Ct. at 941-42. This court will consider each factor in turn.

1. *INCONVENIENCE OF THE FEDERAL FORUM*

This litigation is currently taking place in both this court and the Louisiana Civil District Court for the Parish of Orleans. The factor of convenience usually refers to ease of access to sources of proof, availability of compulsory process, and enforceability of judgments. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843 (1947). While litigation in this court is not inconvenient when measured against those standards, it is certainly inconvenient for the parties to pursue two concurrent, parallel litigations in two courts within the same parish in Louisiana. This case has clearly commanded much judicial resources. No aspect of this case has been easy, expeditious or inexpensive. Since an appeal is pending from the state court judgment, this court finds that it is inconvenient to proceed at this time in federal court. *See Glen Oaks*, 280 F.2d at 334.

2. *AVOIDANCE OF PIECEMEAL LITIGATION*

Consideration of this factor requires the district court to inquire into the scope of the proceeding and nature of available defenses in the pending state court litigation. *Gilbane*, 568 F. Supp. at 1090. This court must consider whether "the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, [and] whether such parties are amenable to process in that proceeding." *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 495, 62 S.Ct. 1173, 1176 (1942). The scope of the state court proceeding is identical to the proceeding in this court. The same parties are involved, and all

of the claims can be satisfactorily adjudicated in the state court. Moreover, the nature and availability of defenses are the same in both courts. Since the state court judgment is currently on appeal to the Louisiana Court of Appeal for the Fourth Circuit, judgment by this court on the merits would inevitably result in two parallel appellate tracks. This result is not only unnecessary, but also it would greatly increase the expense and complexity of this litigation. Furthermore, the parties run the risk of having conflicting adjudications.

3. *ORDER IN WHICH JURISDICTION WAS OBTAINED*

The procedural history of this litigation is quite complicated. Since August 1, 1985, three successive lawsuits have been filed in federal court. State court litigation commenced in February, 1988, when the Council raced to the courthouse and filed a Petition for Declaratory and Injunctive Relief within minutes of the Council's issuance of its Rate Order. While the state court litigation was proceeding, NOPSI filed another complaint in this court on February 9, 1989, for Preliminary and Permanent Injunction and Declaratory Relief. On November 15, 1989, Judge DiRosa issued a decision in state court, and the matter is currently on appeal.

Technically, in the present stance of this litigation, the state court assumed jurisdiction first, at least of those issues directly involved with the factual findings that form the basis of the Council's Rate Order. In essence, however, the multitude of cases filed in this dispute represent one continuous process of litigation.

However, the analysis of this factor "as with the other *Colorado River* factors, is to be applied in a pragmatic, flexible manner with a view to the realities of the case at hand. Thus, priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions." *Moses H. Cone*, 460 U.S. at 21, 103 S.Ct. at 940. In this litigation's current phase, there has been more progress in

the Louisiana court. The Civil District Court has already rendered judgment, and it is presently on appeal. The progress of the state court proceeding is the most dispositive consideration in applying the *Colorado River* factor of the order in which jurisdiction was obtained.

4. *PRESENCE OF RES OR PROPERTY*

Since jurisdiction has not been obtained over a *res* in this matter, this factor is not dispositive.

5. *RULE OF DECISION ON THE MERITS*

The absence of a state law claim does not affect the court's decision to stay the instant litigation. This court's holding that the Council's Rate Order is not facially preempted by federal law leaves only the question of whether the Council's finding is supported by the evidence. This factual determination does not involve serious issues regarding the interpretation or application of federal law.

6. *ADEQUACY OF STATE COURTS*

Louisiana state courts are fully able to redress Plaintiff's complaints. NOPSI has not denied that adequate state remedies exist. Moreover, the local nature of the controversy militates in favor of allowing this litigation to complete the appellate process in the state courts.

In addition to the factors in *Colorado River* and *Moses H. Cone*, the court also notes other considerations which enter into this balancing test. First, there is a "strong federal policy against federal court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 431, 102 S.Ct. 2515, 2521 (1982). This policy is motivated by comity concerns

which dictate "a proper respect for state functions, . . . and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44, 91 S.Ct. 746, 750 (1971). Comity concerns are particularly relevant when there is a possibility of conflicting adjudications. Differing results "could engender difficult problems in reaching an ultimate disposition of the issues involved in the litigation." *Sea Colony, Inc.*, 653 F. Supp. at 1329.

Second, judicial economy weighs heavily in favor of staying this proceeding. Separate adjudications will result in a needless reduplication of effort, greatly increasing the expense and difficulty of this litigation. To continue with this proceeding in the federal court would elevate "form over substance in adhering to the proposition that federal courts have an 'unflagging obligation' to exercise jurisdiction." *Id.*

For the foregoing reasons, the court has decided to stay this matter pending review of the state court decision.

Accordingly, IT IS ORDERED that the instant action be STAYED without prejudice. The court will lift this Stay, on a Rule to Show Cause, if NOPSI demonstrates that the City Council is purposely delaying the appellate process in state court.

New Orleans, Louisiana, this 3 day of Jan, 1990.

/s/ A.J. McNamara
United States District Judge

COURT OF APPEALS ORDER DENYING PETITION FOR REHEARING [OCTOBER 17, 1990]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-3050

NEW ORLEANS PUBLIC SERVICE, INC.,

Plaintiff-Appellant,

versus

THE COUNCIL OF THE CITY OF NEW ORLEANS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING

(October 17, 1990)

Before WISDOM, HIGGINBOTHAM and DUHE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ PATRICK E. HIGGINBOTHAM

United States Circuit Judge

EXCERPTS FROM THE FEDERAL POWER ACT, 16 U.S.C. §§ 791a–828c

Section 201, 16 U.S.C. § 824:

Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

* * *

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824i, 824j or 824k of this title).

* * *

Section 205, 16 U.S.C. § 824d:

Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant

any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative

without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practice; action by Commission; definition

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of

which included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

Section 206, 16 U.S.C. § 824e:

Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affected such rate, charge, or classification is injust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date 60 days after the

filing of such complaint nor later than 5 months after the expiration of such 60-day period. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date 60 days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60-day period. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided,* That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided,* That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C. 79 et seq.]

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

Section 306, 16 U.S.C. § 825e:

Any person, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee

or public utility in contravention of the provisions of this chapter may apply to the Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such licensee or public utility, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such licensee or public utility shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating such complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall find proper.

EXCERPTS FROM THE CONSTITUTION OF THE UNITED STATES

The Commerce Clause (art. I, § 8, cl. 3):

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes . . . .

The Supremacy Clause (art. VI, cl. 2):

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.